

BEFORE THE ENVIRONMENT COURT

Decision No. [2011] NZEnvC 19

IN THE MATTER of an application for an Enforcement Order
under Section 314 of the Resource
Management Act 1991

BETWEEN SAVE OUR ST HELIERS
INCORPORATED
(ENV-2011-AKL-000005)

Applicant

AND ANCONA PROPERTIES LIMITED

AND MICHAEL & SANDRA MARKHAM

AND AUCKLAND COUNCIL

Respondents

Court: Environment Judge L J Newhook sitting alone pursuant to Section 279
of the Act

Date of Hearing: 26 January 2011

Counsel: D A Kirkpatrick and R A Walden for applicant
R B Brabant for Ancona Properties Limited
W Brandon and J Hassall for Auckland Council

**DECISION OF ENVIRONMENT COURT ON APPLICATION FOR
ENFORCEMENT ORDER UNDER S 314(1)(a)(ii) RMA**



[1] Last week I issued an Interim Enforcement Order in an extremely brief decision, without conducting an hearing, preventing demolition of Nos. 8, 10, 12, 14, 16 and 20 Turua Street, St Heliers. I said:¹

[2] In making this urgent decision, the Court has particularly taken account of the matters in subsection (2) and ss (3) of Section 320 of the Act, and the order is made more or less in line with the reasoning of the Court in *I C Pritchard v New Plymouth City Council*² in relation to its reference to s314(1)(a)(ii) RMA, mindful however that it has had to be inferred that the application is one for an interim enforcement order (it was expressed to be for an enforcement order), and mindful of the fact that there has been no undertaking as to damages, and numbers of other serious shortcomings with the papers.

[2] On the same date, 20 January 2011, I issued the following Minute to the parties concerning the recent planning history of the land as it was known to this Court:

[1] This afternoon, I have made an Interim Enforcement Order to be in force for a very short time period. That was done essentially because the effects of the activity sought to be stopped would be irreversible. The parties will note that the reasoning in the decision is extremely short, again because of the urgency of the situation in which I was advised that bulldozers and the police were "at the gate" along with people protesting about the proposed demolition

[2] The parties will also note that I made express reference to this Court's *Pritchard* decision of 1997, and particularly to its reliance on s314(1)(a)(ii). That is a subsection concerned with activities "*likely to be noxious, dangerous, offensive, or objectionable to such an extent... likely to have an adverse effect on the environment*" I was, I must say, mindful at the same time of the decision in *Otorohanga Heritage Protection Group v The Otorohanga District Council*³, which is to somewhat different effect.

[3] Section 314(1)(a)(ii) must be seen in contrast to the immediately preceding subsection (i), concerned with [potential] breaches of the Act, or the district plan, or a heritage order, amongst other things. I mention this because the first affidavit of Ms D McHattie in support of the application discusses a 2004 Character and Heritage Study of St Heliers' Bay (that she exhibits), appearing to treat it as though it had something of the flavour of those statutory instruments. Ms McHattie goes so far as to suggest that the Study's recommendations include that buildings on the eastern side of Turua Street be assessed for "*individual scheduling [as heritage buildings] under the District Plan*"

[4] The first point that parties should be aware of at this time is that the Study does not appear to recommend individual heritage scheduling for

¹ Decision No. [2010] NZEnvC 9, 20 January 2011 at [2]

² Decision No. A20/1997

³ Decision No. A 83/94



buildings. Instead it discusses possible scheduling or notation of buildings in and around the St Heliers' commercial centre, as "character defining", or "character supporting".

[5] Secondly, it may be relevant to see the Study in context. It was a forerunner (no doubt amongst other documents) of instruments promulgated by Auckland City Council known as Plan Change 145 and Variation 145A, which came before the court in recent years, and were the subject of deliberation and decisions after extensive hearings. The key decision was an Interim Decision of my Division, No. A110/2008, *J E Kennedy and others v Auckland City Council*. The appellant Ms Kennedy was a party strongly interested in amenity issues in and around the St Heliers' shopping centre. The other appellants were landowners. Other than Ms Kennedy, no parties espoused heritage and amenity issues at the hearing.

[6] PC 145 as appealed from Council decisions, contained a brief mention in one of its introductory paragraphs of provision for retention of character buildings. A map, called B15/12 St Heliers' Centre Plan, showed six out of eight properties on the eastern side of Turua as being "character defining buildings". The controls provided that buildings identified as character defining in the Centre Plan, required resource consent for a discretionary activity to undertake certain activities such as demolition, removal, relocation, or certain external alterations or additions.

[7] During the life of the cases before this court, various steps were taken, including negotiation amongst parties, and caucusing amongst groups of expert witnesses pursuant to direction of the Court. As a result, by the time the hearing was conducted in late 2007 and early 2008, only three matters remained in dispute, an agreed basis for settling all other matters having been agreed by the parties. The only matters remaining in dispute concerned some particular height controls, a roof bonus rule proposed by one party, and a proposal for exemption from the District Plan's on-site parking requirements.

[8] Character-defining building issues were no longer in dispute, and indeed the provisions in this regard that I have just mentioned had been expressly deleted from the Plan Change by agreement of the parties.

[9] The above may be seen as a process context within which the Study exhibited by Ms McHattie must be seen. It also goes without saying that the Environment Court has not at any time been required to deliberate and rule upon any alleged heritage or character defining qualities of the houses on the eastern side of Turua Street.

[3] Some further reasons for my decision granting the Interim Enforcement Order, over and above those appearing in the decision, are effectively recorded in that Minute. Counsel involved in this week's hearing have each indicated to me that they accept and agree with the contents of the Minute. Of some note, and I think contributing to the efficiency with which matters have been able to proceed since the Interim Decision, Mr



Kirkpatrick, Mr Brabant, and Mr Hassall, all appeared in the PM 145 hearings, and as noted, I presided.

[4] The next day, 21 January 2011, I conducted an urgent conference in Court, and a timetable for preparation for the substantive hearing was agreed, and yesterday's hearing date agreed and set.

[5] The application as originally framed last week, sought relief against all respondents, including the Council, in the following terms:

.. an enforcement order to:

Require Ancona Management Limited and Michael C Markham and Sandra T Markham, or their nominees to cease, or prohibit a person from commencing, anything done or to be done by or on behalf of that person, that in the opinion of the court, –

- (i) Contravenes or is likely to contravene this Act (Resource Management Act 1991) and a requirement for a heritage order
- (ii) Is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment ..

...

[at] Numbers 8, 10, 12, 14, 16, 20 Turua Street, St Heliers Bay, Auckland

.. on the following terms and conditions:

That the demolition of the properties at the location cease or does not commence pending the preparation of a Heritage Assessment of those buildings by Auckland Council and that if the buildings are found to be of heritage value and merit protection then the management of those buildings be carried out such that the buildings are protected, maintained and where possible enhanced.

..

[6] By the time of the hearing this week, the applicant society indicated through counsel that it was not presently seeking relief against the Council. It also, in answer to questions from me, modified the terms and conditions upon which orders were sought, to delete "*properties*" and replace that with "*buildings*", and also to delete the language starting with "*preparation of a Heritage Assessment ...*" and the replacement of that with



"further order of the Court" It also narrowed the basis for seeking relief to item (ii) above, deleting at the same time its pleading of "noxious" and "dangerous."

[7] The setting of the tight timetable and an early hearing (as I have said, by agreement of the parties), came about in part because of what I had read in the affidavit of Mr M C Markham filed before the conference, setting out the lengthy zoning history in similar terms to in my Minute and the lengthy history of the applications for consent to the then Auckland City Council over a period of about 4 years.

[8] For the substantive hearing, affidavits were provided by Mr Markham as just mentioned, Ms D M McHattie on behalf of the applicant society (two, prior to the granting of the interim relief, and one this week), and Ms A Pillay, Ms S M Parsons, and Mr G G Farrant, on behalf of Auckland Council.

[9] I was able to read and closely consider all the affidavits and their many attachments prior to commencing this week's hearing. I also had the benefit of knowledge from the PM145 hearing.⁴

The law

[10] The relevant portion of s 314 RMA, for present purposes, is as follows:

314 Scope of enforcement order

- (1) An enforcement order is an order made under section 319 by the Environment Court that may do any one or more of the following:
- (a) Require a person to cease, or prohibit a person from commencing, anything done or to be done by or on behalf of that person, that, in the opinion of the Environment Court, -

...

- (ii) is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment:

[11] Portions of section 319 are also relevant. They read:

319 Decision on application

- (1) After considering an application for an enforcement order, the Environment Court may—

⁴The key decision from which was the Interim Decision No. A110/2008



- (a) except as provided in subsection (2), make any appropriate order under section 314; or
 - (b) refuse the application.
- (2) Except as provided in subsection (3), the Environment Court must not make an enforcement order under section 314(1)(a)(ii) ... against a person if—
- ..
- (b) the adverse effects in respect of which the order is sought were expressly recognised by the person who approved the plan, or granted the resource consent, or approved the designation, at the time of the approval or granting, as the case may be.

[12] A decision of the Court of Appeal in 1997, *Watercare Services Limited v Minhinnick*⁵ not only provides considerable guidance about these aspects of the RMA, but is of course binding on this Court. That was a case in which resource consents had been granted for the running of a sewer pipeline in South Auckland through an area of considerable Maori heritage called the Matukuturua Stonefields. Mrs Minhinnick sought an enforcement order under sections 314(1)(a)(ii) and s 319 on the grounds that both the idea of conveying sewerage over and across waahi tapu and the associated works were in the circumstances objectionable and offensive to such an extent that an adverse effect on the environment was likely to ensue. The Environment Court had declined to make an enforcement order, the High Court held that the Environment Court had erred at law, and the Court of Appeal in effect restored the decision of the Environment Court.

[13] The case centred on the words "*objectionable and offensive*" in s 314(1)(a)(ii), just as this one does. The following passages from pages 304 – 306 are of considerable importance in the case before me:

Questions 1 and 2(a)

These questions can conveniently be taken together. The first point to make is that it is clear the assessment whether something is noxious, dangerous, offensive or objectionable is an objective one. The bona fide assertion of the person seeking an enforcement order that the matter in question is offensive or objectionable is not enough. There must be some external standard against which that assertion can be measured ... Whether something is offensive usually involves consideration of the person or group against whom the question should be measured.

The more is this so when the question is whether something is objectionable. What is objectionable to one person may not be to another. Obviously the subject-matter said to be offensive or objectionable will be relevant to the inquiry. It is important to note that s 314(1)(a) directs that whether something is offensive or objectionable depends on "the opinion" of the

⁵[1998] INZLR294



Environment Court. That formation of opinion must of course be done judicially after considering all relevant evidence tendered and after a correct appraisal of all relevant matters of law, but ultimately the legislation requires the Court to form its opinion first whether the subject-matter is or is likely to be ... offensive or objectionable and .. whether any ... offensive or objectionable aspect found to exist is of such an extent that it is or is likely to have an adverse effect on the environment. In essence the necessary inquiry involves four steps:

1. Whether the assertion of the applicant seeking the enforcement order that the subject-matter is ... offensive or objectionable is an assertion honestly made.
2. If so, whether in the opinion of the Court the subject-matter is or is likely to be ... offensive or objectionable.
3. If so, whether in the opinion of the Court any ... offensive or objectionable aspect found to exist is of such an extent that it is likely to have an adverse effect on the environment.
4. If so, whether in all the circumstances the Court's discretion should be exercised in favour of making the enforcement order sought or otherwise.

At steps 2 and 3 the Court acts as the representative of the community at large. In that capacity the Court must decide whether the claim of the objector to find the subject-matter offensive or objectionable is a justified one. In coming to that assessment the Court must consider the relationship between the objector and the subject-matter and all other features of the case which are said to justify the objector's contention on the one hand or not justify it on the other. For example, in this case Mrs Minhinnick's claim to find the proposed works objectionable on the various grounds she advanced must be considered against the circumstance that earlier opportunities to object were not taken up.

The Court must weigh all the relevant competing considerations and ultimately make a value judgment on behalf of the community as a whole. Such Maori dimension as arises will be important but not decisive even if the subject-matter is seen as involving Maori issues. Those issues will usually, as here, intersect with other issues such as health and safety: compare s 5(2) and its definition of sustainable management. Cultural well-being, while one of the aspects of s 5, is accompanied by social and economic well-being. While the Maori dimension, whether arising under s 6(e) or otherwise, calls for close and careful consideration, other matters may in the end be found to be more cogent when the Court, as the representative of New Zealand society as a whole, decides whether the subject-matter is offensive or objectionable under s 314. In the end a balanced judgment has to be made.

As earlier indicated, the Environment Court in forming its opinion under s 314(1)(a) is the representative of New Zealand society as a whole. That is the equivalent of the community at large. The views of individual members of society must always be sympathetically considered but the Resource Management Act does not require those views to prevail irrespective of the weight of other relevant considerations.

[14] Mr Kirkpatrick submitted that the thing that is offensive or objectionable in this case would be the demolition of the Turua Street houses, and that the adverse effect on



the environment would be the loss of the buildings, which separately and together are, he submitted, items of historic heritage worthy of protection from inappropriate use and development in terms of s 6(f) RMA (a section that informs the purpose of the Act in s 5).

[15] In terms of s 319(2)(b), the question about whether the adverse effects in respect of which the order is sought were expressly recognised by a person who granted a resource consent, Mr Kirkpatrick drew my attention to the resource consent decision of the independent hearing commissioner at the Auckland City Council, Mr C Stewart. He took me extensively through the decision of the Commissioner and materials leading up to his hearing, in particular a report under s 42A RMA, and while asserting that the Commissioner did not expressly recognise the heritage value of the existing houses, he acknowledged that in order to make the ground out, the applicant must show that there is such heritage value, that there was evidence of it at the time of the grant of consent, and that it was not expressly recognised by the Commissioner. It was his submission that there was to be found in the evidence, material demonstrating heritage value which was or should have been available to the reporting officer of the Council, and which was not made available to the Commissioner. He submitted that the information showed that the heritage value of the buildings required an assessment before determining the application, or at the very least, that the Council should have been on inquiry in that regard, given its s 6(f) duties on a subject of national importance.

[16] Mr Kirkpatrick stressed that the application had been considered holistically as one for discretionary activity, with no restriction on the exercise of the Council's discretion, and that pursuant to s 104, the exercise of the power to grant consent was subject to Part 2 of the Act. Mr Kirkpatrick noted that the s 42A report referred expressly to Part 2, and to s 6(f) but then recorded that the section was not relevant to consideration of the proposal. He submitted that the reporting officer had assumed that the steps that had been taken, (noted in my Minute to the parties last week), of removing the houses from the identified "*character*" buildings in the PM 145 concept plan, meant that those buildings no longer warranted consideration as heritage buildings. Mr Kirkpatrick submitted that the assumption was wrong.

[17] Mr Kirkpatrick cited a decision of the Environment Court, which amongst others, I have found helpful. It was *Donnelly v Gisborne District Council*⁶ in which a private

⁶ Decision No. A13/99



citizen sought an order prohibiting the council from demolishing some elaborately designed public toilets in the middle of a Gisborne street that dated from 1921

[18] Judge Whiting, sitting alone, considered dictionary definitions of “*offensive*” and “*objectionable*” in the Oxford Shorter English Dictionary 3rd edition, which I have also considered and found instructive. They are as follows:

Offensive:

- 1 of or pertaining to attack; attacking; aggressive; serving or intended for attack; having the function of or aimed at attacking an opponent.
2. hurtful, harmful, injurious.
3. causing offence; giving or liable to give offence; displeasing; annoying; insulting; disgusting; noxious.

Objectionable:

Open to objection; undesirable, unpleasant, offensive, disapproved of.

[19] Quoting a decision of the Court of Appeal, *McKenzie v Attorney General*⁷, the Judge noted that:

.. in the end the issue, like most issues of statutory interpretation, is the natural and ordinary meaning of the words of the Act, read in their context and in the light of the purpose of the Act.

[20] The Judge then undertook an extensive discussion of the words “*environment*”, “*effect*”, “*natural and physical resources*”, and “*amenity values*”, found in the Act, noting that they are extremely wide. I agree with his analysis. The Judge then noted the relevance of s 7(e) of the Act, which as submitted by Mr Kirkpatrick in the present case, has more recently been elevated to be s 6(f) and therefore has greater importance in informing the purpose of the Act:

The protection of historic heritage from inappropriate subdivision, use, and development.

⁷ [1992] 2NZLR 14



Is there proof of heritage qualities concerning these houses, to the required standard?

[21] The only party to introduce direct expert opinion evidence in this case, was the Auckland Council. Its Principal Heritage Advisor Central, Mr G G Farrant, is a person who has served in more or less that role (with varying titles) for many years. He gave evidence against the background of criteria that he regularly employs for heritage assessments, that while the fate of the houses is of significant concern to parts of the community, and they are clearly of character significance to some in the community, they do not rate protection in the District Plan because they achieve a low score when considered for protection by heritage scheduling. I shall return further to Mr Farrant's evidence.

[22] Although all parties could have called direct heritage evidence, the applicant and the owner contented themselves with referring to documents in the public domain concerning the houses, and making what they wished of Mr Farrant's evidence. No applications were made to cross examine any of the witnesses including Mr Farrant.

[23] The Society's witness Ms McHattie exhibited a document entitled "*Heritage Assessment the east side of Turua Street, St Heliers Bay, Auckland*" by Mr Adam Wild, a heritage architect and a director of a firm called Archifact Limited. The document bears a stamp "*Draft*" and was dated October 2005, having been prepared for the architects responsible for the recently consented development.

[24] In the executive summary of that report, it is noted that the "art deco" houses at Nos. 8, 10 and 12 are very important as they contribute to the nature and history of the distinctive local St Heliers character as a whole. Nos 14, 16, and 20 were said to be important as regards scale, relationship to the street, construction, and age, contributing positively to the streetscape, but not thought to be irreplaceable. Discussion tended to focus on aspects of construction and streetscape character.

[25] In the report's detailed discussion, it was recorded who the houses had been built for (in the case of Nos. 8, 10 and 12, a Mr & Mrs New). Having described the architectural detail of those 3 houses, the report describes them as "*particularly*



important in the context of St Heliers, contributing in two ways, firstly, contributing to and reinforcing the scale of Turua Street as a secondary street in the village, and secondly, and perhaps more importantly, playing a part in the wider understanding of St Heliers as a seaside village in its "garden city" planning heritage, by reference to whimsical nature, relationship with the sea, and character and contribution to the history of St Heliers.

[26] Nos. 14 and 16 are described as some of the oldest in the street, with No. 14 being of the most interest, with alterations having been more sympathetic to its heritage values. Mr Wild referred to the then version of PM145 as labelling these as character-defining buildings. He said *"this is perhaps true in that their historic and/or architectural elements, their urban structure and streetscape appearance make a major contribution to the character of St Heliers. Their individual contribution to the St Heliers Bay character however suggests that the loss of these buildings would not change the character of St Heliers"*. He recorded that *"it would be difficult to support Council's opinion that a replacement building may not substantially compensate for the loss"*

[27] Mr Wild's description of No. 20 focuses more on character, and the scale and feel of Turua St, albeit that it is noted that it is one of the original houses in the street, and that it is by and large in its original condition. He recorded that *"whether the loss of this building would change the character of St Heliers, a replacement building may not substantially compensate for the loss, it would be difficult to argue"*

[28] Leaving aside the "Draft" stamp and the strong argument amongst counsel as to whether it would be speculation about whether Mr Wild would continue to hold such opinions, I have the view that references to historical value on the part of these houses is very general and low-level and is really rather a sub-set of their contribution to St Heliers as character-defining or character-supporting. For the purposes of the RMA, there is a considerable difference, remembering that "historic heritage" is defined in s 2 RMA as follows:

historic heritage

- (a) means those natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures, deriving from any of the following qualities:
- (i) archaeological:
 - (ii) architectural:
 - (iii) cultural:
 - (iv) historic:



- (v) scientific;
- (vi) technological; and
- (b) includes—
 - (i) historic sites, structures, places, and areas; and
 - (ii) archaeological sites; and
 - (iii) sites of significance to Māori, including wāhi tapu; and
 - (iv) surroundings associated with the natural and physical resources

[29] Mr Kirkpatrick was critical that Ancona or its professional advisers were wrong to have decided to not submit the Wild report to the Council with its Assessment of Effects on the Environment. Given the nature of the references in it to the houses in question, I do not agree with the criticism.

[30] As to the Council's knowledge, Mr Kirkpatrick submitted that the reporting officer on the more recent resource consent application (non-notified) was aware of both the history of PM145 and of the earlier application to undertake a similar development. The officer had noted that the first application had been publicly notified and attracted a number of submissions. While acknowledging that it would be unlawful for the Council to have [express] regard to submissions on another application, Mr Kirkpatrick submitted that the Court could take account of the fact that submissions against the application were quite numerous. He reminded me that Ms McHattie had exhibited some in her third affidavit in these proceedings, including her own submission and one from a resource management planner and resident in the area, referring to heritage issues.

[31] That s 42A report was exhibited to the affidavit of Ms Pillay. Amongst many other things, it briefly described the buildings, and noted that since the previous application, the Environment Court had issued a decision making the St Heliers Centre Plan Change operative, including as to the removal of proposed provisions identifying Nos. 8 – 16, and 20 Turua St as character-defining buildings. The report noted that demolition of the buildings, when proposed along with consent being sought for replacement buildings, would be a controlled activity (noting however that overall, the application was for a discretionary activity).

[32] Under the heading Visual Amenity, Character and Urban Design, a description of the buildings was offered in streetscape terms, but without any reference to heritage. In that vein (streetscape character), the reporting officer said that he did not personally support the demolition, but recorded his conditional support for the proposal as lodged.



He noted that there had been consideration of "character" matters in a report from council's senior urban designer, Ms N Williams, which I shall come to.

[33] As to s 6 RMA, the officer did indeed record his opinion that matters such as protection of historic heritage from inappropriate subdivision, use and development, were not relevant to the application.

[34] I have considered a report from that senior urban designer, Ms Williams, also annexed to the affidavit of Ms Pillay. This report having been prepared in connection with the second resource consent application, it was termed her "later report" during my hearing, and I shall adopt that terminology. It is dated 23 November 2009. Of relevance to the present issues, it recorded the removal of the buildings from the character-defining and character-supporting controls in PM145. It recorded that one of the houses was the first duplex weatherboard house in Auckland [No. 20], and said this of Nos. 8, 10, and 12:

The other unfortunate loss of the intrinsic seaside character of the area is that of the three art deco cottages at 8, 10 and 12 Turua St. Whilst I do not personally support the demolition of these cottages, the current proposal does however represent a satisfactory scale, grain, and contextual response to the wider assessment criteria detailed within the Plan Modification.

[35] She offered a comment in relation to one of the assessment criteria in that document: "*whilst the three existing art deco cottages do inherently contribute to the seaside character of St Heliers, they are unfortunately no longer classified as character defining buildings.*" Historic heritage essentially gets no mention.

[36] My attention was drawn by counsel to a report prepared by an urban design consultant to the owner, the late Mr Barry Rae of Transurban Design and Planning. This was dated 8 May 2009. Mr Rae was known to the Court as a skilled and experienced urban designer who quite often provided evidence in appeal hearings, and sometimes touched on matters of heritage architecture. In the report he recorded that in the late 19th century, St Heliers was subdivided in order to develop a "model" seaside suburb, and that the centre retains a range of building types from different periods, indicating historic development of the centre and its changes over time. He provided photographs of the buildings the subject of the present proceedings (amongst others), describing them as old and generally in poor condition. He offered a reasonably extensive description of streetscape and amenity, and such things as residential interface, but contrary to Mr



Brabant's submission that the inclusion of the photographs raised an aspect of heritage that must have found its way into the thinking of the hearing commissioner, I do not accept that there is evidence of that for the purposes of s 319(2)(b).

[37] The decision of the council's hearing commissioner, Mr Conway Stewart, dated 17 August 2010, is essentially devoid of reference to matters of historic heritage. That is perhaps not surprising, given the dearth of reference to matters of historic heritage in the reports that he considered. I find for the purposes of s 319(2)(b) that he did not expressly recognise the relevant adverse effects at the time of granting consent, so there is no bar to the making of an enforcement order, from that section, in this case.

[38] What other knowledge might the Council have had concerning heritage, and what was the importance of that?

[39] I have already referred to something that I have called the "*later report*" from Ms Williams. There was also her "*earlier report*" prepared concerning the earlier resource consent application at a time when PM145 was still in its "decisions version" before resolution of the PM145 appeals by the Environment Court. The latter is dated 24 November 2008. It describes the relevant buildings in quite some detail, but very much from an urban design and character point of view. Ms Williams then strongly recommended that the three "*Spanish mission style cottages at 8-12 Turua St*" be retained within their existing surrounds, and that contiguous sites should then be re-designed to sympathetically relate to them at their southern interface, given strong community reaction about proposed demolition, intrinsic sense of character, and their being "*seaside inspired*". She considered them to be character-defining. While initially drawing on this report in relation to his submissions about heritage, Mr Kirkpatrick acknowledged to me that its emphasis, and its recommendations, were in relation to character.

[40] Ms McHattie's first affidavit exhibited a 2004 report entitled the "*Character and Heritage Study – St Heliers Bay*" prepared for Auckland City Council by two firms of landscape architects and two firms of architects (the latter, Matthews & Matthews and Salmond Reed, having amongst them, skills relating to heritage architecture). The report records some history of the area, including as to Maori and early European history, the establishment of the early ferry service, and the building of early commercial structures and public buildings including the Public Library which is scheduled as a Category B



heritage item in the District Plan. Considerable description of the current commercial area is offered in architectural and urban design terms, and the report is clearly a forerunner of PM145 as first introduced. There are small photographic illustrations of the relevant buildings with approximate dates of construction, and the briefest possible mention of history. Recommendations in the report are clearly directed to matters of character. Some "streetscape study record" forms are attached, only in relation to Nos. 16 and 20 Turua St from amongst the subject houses, a photograph of each is supplied, and a box ticked in relation to "historical" significance. Each is recorded in the briefest of terms as having high cultural heritage value on account of being an early residential building, but no more is said. I cannot regard these as heritage assessments that offer the Court any real insight into the comparative heritage importance of those two houses to the community. There are of course huge numbers of "early residential buildings" in a city like Auckland, offering a great range of heritage values from very little at all to very important.

[41] Mr Kirkpatrick acknowledged that the houses are not identified as heritage items in the District Plan, a matter of common ground amongst the parties. He also acknowledged that there was no secondary administrative document such as the heritage inventory referred to in *Pritchard v New Plymouth City Council*⁸. He referred to a Heritage Walk brochure attached to Ms McHattie's third affidavit which he submitted demonstrates that the Council had published material acknowledging the heritage value of the houses. That recorded (without graphic illustration):

The three art deco/Spanish style houses at 8, 10, 12 were built in 1935. Nos. 14 and 16 are small 1890s villas now altered and adapted to commercial use. No. 18 was originally a bus depot built 1930s/40s. No. 20 is a rare example of a 1910s duplex residential building.

[42] Mr Kirkpatrick acknowledged to me that this was not evidence of expert opinion, contenting himself with submitting that the Council had simply published the brief statements.

[43] Mr Kirkpatrick submitted, I consider rightly, that it is good law from the *Donnelly* decision, that it is not essential for buildings to be formally identified before they warrant consideration as historic heritage. He did also however properly record that the applicant is mindful of the issue raised by me in the conference late last week that there must be

⁸ A20/97



some limit on the extent to which an application made under s 314(1)(a)(ii) can be entertained without putting in doubt large numbers of resource consents that have been granted, and he acknowledged that there must be some threshold over which an applicant for an enforcement order must pass so that the certainty and stability of the resource consent regime is not undermined. As Mr Hassall submitted as well, about the integrity of the process. Mr Kirkpatrick acknowledged that the Court must exercise its judgment on a principled basis to ensure such certainty and stability in the interests of justice and consistent with the purpose of the Act, and I agree.

[44] Further on the subject of Council's own knowledge, on 16 January 2011, councillor Sandra Coney wrote to the CEO of Auckland Council criticising a letter that the latter had written to councillors on 14 January 2011, and a memorandum dated 24 December 2010 from him addressed to the Mayor, councillors, and certain officers. While the debate between the CEO and councillor Coney about whether or not there had been adequate heritage assessment of the properties is interesting, my job has been to analyse the extensive documentation that has been placed before me. I have already held that the bar to relief under s 319(2)(b) is not present, but I need to form an opinion from the evidence about whether the proposed demolition is likely to be offensive or objectionable, and if so, whether to such an extent it is or is likely to have an adverse effect on the environment, before ultimately exercising the discretion one way or the other. That task is the Court's, not that of the CEO of the Council or any individual councillor.

[45] Mr Brabant made the submission that, by reference to some of the earlier decisions of the courts, considerably more was required to be proved by an applicant such as the Society, in a hearing seeking a substantive enforcement order compared to that for an interim enforcement order. He referred to the three decisions in the chain of *Pritchard* litigation, already mentioned, and a decision of my own, *The Gulf District Plan Association v Arrow Properties Limited*⁹ (concerning threats to demolish the Rocky Bay Store on Waiheke Island), and the *Donnelly* decision already referred to. I agree with that submission, the point being clearly borne out by those decisions. In the later substantive hearings in some of those cases, numbers of heritage architects provided evidence, and the final *Donnelly* decision is an example of one where substantive relief was granted under s 314(1)(a)(ii). *Pritchard*, and is an example of the reverse.



[46] There was considerable submission by all three counsel about how I should regard the very recent evidence of Mr Farrant, as earlier mentioned. Mr Kirkpatrick was inclined to characterise it as an example of what can be done "*when the pressure comes on*", but he submitted that while Mr Farrant's opinion was entitled to respect, there were a number of factors which should be considered, including that it "*follow[ed] a non-statutory procedure of his own devising which cannot be determinative of the scope of section 6(f)*", and that it was "*made in response to pressure from the Council and its CEO and in order to substantiate an oral opinion given at the meeting of the Council on 16 December 2010*".

[47] In this regard I prefer the submissions of Mr Hassall and Mr Brabant to the effect that the opinion of Mr Farrant is deserving of respect, given the considerable extent of his experience in this area, essentially as a leader in it in New Zealand. His system for carrying out heritage assessments, including the assigning of varying levels of points of different aspects, has been respected in decisions of the Court. It is acknowledged that it involves value judgment, but I also accept it to be transparent and quite objective. I am aware of instances in which assessments by Mr Farrant and his team, and their consequent conclusions, have changed over time as matters are negotiated or debated amongst parties, either informally or in Court, but that is not a reason for not according the system respect so far as it goes on this occasion. The Society's counsel did not seek to cross-examine Mr Farrant and no other first-hand expert heritage opinion evidence was tendered. Mr Farrant's opinion has to be seen as being the best material I have to work with, and the only first-hand account from an expert and in any detail, of the heritage value of the buildings.

[48] I feel bound to hold in the circumstances, standing as I am in the "shoes of the community" as directed by the Court of Appeal, that while I consider that the subject matter of the case is likely to be somewhat offensive or objectionable, I cannot go so far as to find such to an extent that is likely to have an adverse effect on the environment, given the dearth of information, and in particular expert opinion, that these buildings have any significant value for the purposes of historic heritage as defined in the Act. Sadly, it is not sufficient in the current analysis to acknowledge that the buildings are much liked or even loved, by a section of society. I know that will come as considerable disappointment to those who genuinely hold these buildings in affection and regard them (from a lay point of view) as important in heritage terms. However, I am duty-bound to work with the evidence presented to the Court, in a principled way.



[49] In light of the last finding, I do not need to provide extensive reasoning for another finding that I shall make, on Mr Brabant's submission that the Society's proceedings are in the nature of a judicial review. They are not, particularly as I read the relevant parts of s 314 and s 319 and the guidance and direction from the Court of Appeal in the *Minhinnick* case. The present proceedings are the exercise of a particular specialist jurisdiction accorded the Environment Court by Parliament.

[50] For completeness, I should briefly discuss the fourth aspect directed by the Court of Appeal, the overall discretion about whether to issue an enforcement order. I note that I am considered to be the representative of the community at large, and am required to make a principled and justified decision if I am to make an enforcement order. I remind myself that the Court of Appeal observed that "*the views of individual members of society must always be sympathetically considered, but the Resource Management Act does not require those views to prevail irrespective of the weight of other relevant considerations*". I reiterate that the preponderance of information concerning these buildings is in the area "*character-defining*" or "*character-supporting*" rather than concerning qualities of historic heritage. While I acknowledge the strong views of what may be quite large numbers of the community in favour of retaining the buildings, so too are there opposing views.

[51] Another factor, rather like one that arose in *Minhinnick*, is that there have been opportunities in the past, not taken up, for interested members of the public to advocate for these houses. For instance, persons or groups could have submitted to the Council on its consideration of PM 145, that a character-defining notation was not enough. Equally they could then have become parties before the Environment Court on the plan change, pressing for some kind of heritage description, and opposing that which ultimately occurred by agreement of parties, the deletion of even that lower-level notation in the plan.

[52] Also on the topic of the overall discretion, Mr Brabant submitted that to make an order would be futile, because if the owner were to re-apply for consent in relation to the removal of the subject houses, that application if made in the context of seeking consent as well for replacement buildings, would be judged as a controlled activity, for which consent could not be refused, and in relation to criteria far removed from heritage issues. It was Mr Kirkpatrick's position that the previous applications had been, of necessity having regard to case law, judged holistically as discretionary activity applications. He



slightly grudgingly conceded that if approached carefully, any fresh application could be framed in controlled activity terms, but he considered that it would be speculative as to whether that would be done. The point remains that it could be, and given the apparent keenness of the owner to proceed with the development, I infer that it might well be. It is a small matter, but I take account of it in relation to the exercise of the overall discretion which, as I have indicated, I am addressing out of completeness.

[53] While not really being of a nature to influence the exercise of overall discretion, I mention for the record that the owner delayed demolition activity for approximately a month until last week, to give the Council an opportunity to consider alternatives to that course.

[54] For all the reasons thus far put forward, I would not exercise the discretion to issue an enforcement order.

[55] I say again that my decision will come as a great disappointment to the Society, which through the skilled efforts of its counsel, and devotion of its witness Ms McHattie, strove, as I now find things to be, against the odds. As will now be clear, my decision is to refuse to issue an enforcement order. The interim enforcement order of course now lapses.

[56] Costs are reserved.

DATED at Auckland this 27th day of January 2011



L. J. Newhook
Environment Judge



